IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1815 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NIRMA DETERGENTS

Versus

VARUN AGENCIES

Appearance:

1. Civil Revision Application No. 1815 of 1995

MR MB GANDHI for Petitioner No. 1-5

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 20/11/2003

ORAL JUDGEMENT

1. The petitioners -original plaintiffs, by filing this Revision Application under section 115 of the Code of Civil Procedure [hereinafter referred to as the Code] have challenged the judgment and order dated 28th March 1995 passed by the learned Judge, Court No. 18, City

Civil Court, Ahmedabad in Civil Misc. Application No. 574 of 1993. By allowing the said Civil Misc. Application No. 574/93, the decree passed in Summary Suit No. 5853 of 1988 came to be set aside by restoring the suit to be restored to be tried afresh.

2. The petitioners had filed Summary Suit No. 5853/88 in the City Civil Court to recover an amount of Rs.1,58,299-70 from the respondents - original defendants. The said suit was filed as a Summary Suit under the provisions of Order 37 Rule 1 and 2 of the Code. After filing of the suit, summons were sent to the respondents-defendants. The summons which were sent by Registered Post AD were not received back duly served on the respondents-defendants. The summons which were sent for service to the respondents-defendants through process of the Court were served by the Bailiff of the District Court, Alwar by affixing on the conspicuous part of the residence where the defendant No. 2 was residing. In the trial Court, on the reverse of the summons Exh. 14 there is an endorsement dated 11.4.1991 of bailiff Shri Dwarakaprasad of District Court, Alwar which makes it clear that when the defendant No. 2 had refused to accept the summons, the same were affixed on the residence of the said defendant. At the time of affixing the summons, two witnesses were kept present, one Premchand Jain and the other Rajendrakumar Jain. The Summary Suit was thereafter placed before the Chamber Judge, City Civil Court and as the respondents-defendants had not appeared to contest the said suit, a decree for Rs.1,59,928-17 with running interest at 12% came to be passed on 4.7.1991.

3. The petitioners, to execute the decree, had filed Execution Petition No. 7 of 1993 in the District Court, Alwar, Rajasthan. In the said execution proceedings, warrant for attachment came to be served on the respondents-defendants by affixing on the house of the respondent No.2 on 16.7.1993. On 12.8.1993, the respondent No. 2 had inspected the record of the Execution Petition No. 7/93 filed in the District Court at Alwar and found that an ex-parte decree was passed in Summary Suit No. 5853 of 1988 by the City Civil Judge on 4.7.1991. The respondents filed Civil Misc. Application No. 574 of 1993 under Order 37 Rule 4 of the Code in the City Civil Court, Ahmedabad to set aside the decree. The said application was contested by the petitioners by filing reply Ex. 12, interalia contending that the respondent had deliberately not mentioned his address in the application for setting aside the decree. It was averred that the summons were tried to be served on the

respondent No.2 at the address stated in the plaint, but as the respondent No. 2 has refused to accept the summons, the bailiff of the District Court, Alwar had served the said summons under Order 5 Rule 17 of the Code by affixing on the residence of the respondent No.2. Along with the reply, the petitioners had also produced a copy of the Execution Petition No. 7 of 1993 filed in the District Court at Alwar. In the said Execution Petition, the address of the respondent No. 2 was mentioned as Katoriwala Building, Kallupada Mohalla, Alwar, Rajasthan. It was averred that the same address was mentioned in the plaint of Summary Suit No. 5853 of 1988. It was further contended that the respondent No. 2 had knowledge that Summary Suit No. 5853 of 1988 was filed by the petitioners in the City Civil Court, Ahmedabad for recovery of Rs.1,58,299-70 and the respondent No.2 has deliberately not appeared and had tried to make a show that he was not aware of the pendency of the suit by concealing the fact that he was duly served with the summons of the suit by affixing under the provisions of Order 5 Rule 17 of the Code. It was, therefore, prayed by the petitioners that the application filed by the respondents to set aside the decree may be dismissed with cost.

4. The respondents have filed rejoinder affidavit at Exh. 15 interalia denying that the respondent No. 2 was served by substituted service of the summons of the suit on 11.4.1991. It was contended that on the said date, the respondent No. 2 was not present at his residence but in fact he was at Bariyal Kala, District Dassa and he was sick and took medicine from Doctor S.S. Khuntata from 10.4.1991 to 12.4.1991. Xerox copy of a certificate issued by Primary Health Centre was also produced which was not exhibited by the trial Court.

5. The learned Judge, Court No. 18 heard the Civil Misc. Application No. 574 of 1993 and came to a conclusion that the respondent No. 2 was not served with the summons of Summary Suit No. 5853 of 1988 and therefore he had allowed the application by setting aside the decree which has given rise to filing of this Civil Revision Application by the present petitioners-original plaintiffs-decree holders.

6. The summons of this Revision Application was served on the respondent No. 2 by direct service. Inspite of service of the summons on the respondent No.2, this Court [Coram: S.K. Keshote, J., as he then was] had directed by order dated 15.02.2000 that the summons on the respondents No. 1 and 2 be served by way of

substituted service by publication in the newspaper "Rajasthan Patrika" Jaipur edition. The summons were accordingly published on 14th March 2000 in the newspaper, "Rajasthan Patrika" Jaipur edition. Thus, the summons of this Civil Revision application is duly served on the respondents but the respondents have not cared to appear before this Court either personally or through Advocate.

7. This Court is aware about its limitations under section 115 of the Code, but as per the proviso to section 115 of the Code as amended by Act No. 46 of 1999, this Court can vary or reverse any order including an order deciding an issue in the course of a suit or other proceedings where the order, if it had been made in favour of a party, would have finally dispose of the suit or other proceedings. Therefore, in view of the proviso to section 115 which was introduced by Act No. 46 of 1999, this Court can interfere with the impugned order because if it had been passed in favour of the petitioners it could have finally disposed of the Summary Suit No. 5853 of 1988.

8. Learned counsel for the petitioners has submitted that the Court, while passing the impugned order, had not verified from the original records that the respondent No.2 was served with the summons of the summary suit, but he deliberately did not attend the court which had resulted into passing of the decree in the Summary Suit No. 5853 of 1988. This Court, at the time of hearing of this Civil Revision Application has called for the original record and proceedings of Civil Misc. Application No. 574 of 1993 and Summary Suit No. 5853 of 1988. The record of the Summary Suit indicates that the summons of the suit was served on the respondent No. 2 by affixing the said summons at his residence as he had refused to accept the same. The said summons was affixed on the residence of the respondent No. 2 by the bailiff of District Court, Alwar in the presence of two witnesses whose names have been mentioned in the earlier part of this judgment. Therefore, the finding of the learned City Civil Judge in the impugned judgment that the summons of the Summary Suit was not served on the respondents is illegal and against the evidence produced on the record of the suit. It may be mentioned that the summons of Darkhast proceedings, being Execution Petition No. 7 of 1993 filed in the District Court at Alwar was also served on the respondent No. 2 by affixing at his residence, and the same address was shown in the plaint as well as in the Darkhast proceedings. The respondents in Civil Misc. Application No. 574 of 1993 had

deliberately not mentioned the residential address of the respondent No.2, with a view to conceal the address, so that it may be contended that he was served with the summons of the suit by affixing the same on his residence at Alwar. The respondents, with a view to frustrate the recovery of the decretal amount, has tried to make a show that he was never served with summons of Summary Suit No. 5853 of 1988. It must be also stated that at the time of filing Civil Misc. Application in the City Civil Court under Order 37 Rule 4 of the Code in support of the averments made in the application, no documentary or oral evidence was adduced by the respondents and the learned trial Judge had accepted bare statements and averments made in the application, without verifying the record of Summary Suit No. 5853 of 1988 and other documentary evidence produced by the petitioner. Therefore, the impugned order is passed contrary to the evidence and against the provisions of law, and deserves to be quashed and set aside.

9. In the result, this Revision Application deserves to be allowed, and is hereby allowed. The judgment and order dated 28.3.1995 passed by the learned Judge, Court No. 18 in City Civil Court, Ahmedabad in Civil Misc. Application No. 574 of 1993 is quashed and set aside. The order restoring the Summary Suit to file to be tried afresh is also quashed and set aside. Ad-interim order 12.2.1996 passed in this Revision Application restraining the petitioners from proceeding with the execution of the decree also stands vacated. Rule is made absolute accordingly. No order as to costs.

[M.H. KADRI, J.]

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